

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2888/P1dn
MGD:jld:pg

August 13, 2001

Rep. Freese:

1. From what I understand, an embryo cannot survive cryopreservation indefinitely. *See, e.g.*, <http://www.civf.com/ivfcryopres.htm> (Web site of Cooper Center for In Vitro Fertilization). Therefore, this bill may be construed as prohibiting the cryopreservation of human embryos or continuing their cryopreservation without a plan to implant them later. *See* s. 939.23 (3) (“[i]ntentionally” means that the actor either has a purpose to do the thing or cause the result specified, or *is aware that his or her conduct is practically certain to cause that result*” (emphasis added)). Is that your intent? (If it is, then, unless s. 940.17 (2) is ruled unconstitutional (*see* Items 2 and 3), sub. (2) (b) of the nonstatutory provision may be unnecessary.)

2. If the bill does not permit indefinite cryopreservation, the donors of the gametes from which in vitro embryos are derived must consent to the implantation of all of them in the uterus of the egg donor or another woman, even if one or both donors later object. Neither the U.S. Supreme Court nor the Wisconsin Supreme Court has addressed the constitutionality of such a requirement, but as you know, both courts have upheld a woman’s right not to procreate. Those cases, however, have focused on a woman’s constitutional right to decide matters relating to her own body, a right that might not be germane here. *See Kass v. Kass*, 91 N.Y.2d 554, 696 N.E.2d 174 (1998) (http://www.law.cornell.edu/ny/ctap/I98_0049.htm). Nevertheless, in cases involving in vitro fertilization, courts in other states have acknowledged that a person has a right not to procreate independent of his or her right to bodily autonomy. *See Davis v. Davis*, 842 S.W.2d 588, 601, 1992 Tenn. LEXIS 400, *45 (1992); *Litowitz v. Litowitz*, 102 Wash. App. 934, 944, 10 P.3d 1086, 1092, 2000 Wash. App. LEXIS 2012, *20 (2000). Thus, the prohibition on causing the death of an in vitro human embryo — particularly in a case in which the embryos already exist — may be ruled unconstitutional.

3. Existing contracts between IVF clinics and their clients may contain provisions regarding the disposition of unused embryos that conflict with what this bill requires. Therefore, this bill may be construed as an unconstitutional impairment of those contracts under article I, section 12, of the Wisconsin Constitution and article I, section 10, of the U.S. Constitution. *See Reserve Life Ins. Co. v. La Follette*, 108 Wis. 2d 637, 323 N. W. 2d 173 (Ct. App. 1982). One way to address this problem would be to include an initial applicability provision that would make the prohibition on causing the death of an in vitro human embryo inapplicable to contracts in force on the effective date of

the bill. (Such a provision might also reduce the risk that the statute would be found unconstitutional on autonomy or privacy grounds.)

4. The “any organism” language that Mary Klaver proposed for defining “human embryo” is so broad that it covers adult human beings. I assume that you do not intend for the definition to be so broad, so I used a different definition for “in vitro human embryo.”

5. With advances in technology, it may ultimately become possible to separate an embryo in the earliest stages of its development (for example, at the 2-cell or 4-cell stage) into single cells (from which stem cells might ultimately be generated) without subjecting the embryo to a substantial risk of death or bodily harm (although it is unclear how a court will interpret that prohibition if the original embryo is divided into separate living cells). As drafted, the bill does not prohibit that conduct. Should it?

6. The references in subs. (7) and (8) to “conduct that is described under sub. (2), (4), or (6)” include conduct that occurs outside of this state. Those provisions, however, do not cover materials (such as insulin or other biochemicals) that might be produced by cells derived from stem cells. Is that your intent?

7. Do you want to create an exception in subs. (7) and (8) that would permit a person to acquire and possess an embryo that was created for an unlawful purpose under sub. (6) if the person acquiring or possessing the embryo does so with the intent to have the embryo implanted in a woman?

8. At some point, stem cells may be used to produce cells or tissues for implantation in a human being. If those stem cells were the result of conduct described in sub. (2), (4), or (6), and the person in whom the cells or tissue have been implanted is in Wisconsin, the person arguably “possesses” cells or tissue in violation of sub. (8), even if the implantation procedure was legal in the state in which it occurred. Is that your intent?

9. This bill does not affect the disposition of an egg the cell wall of which has been penetrated by a sperm cell but whose genetic material has not yet fused with the genetic material from the sperm cell (“pre-zygotes”). Is that your intent?

Michael Dsida
Legislative Attorney
Phone: (608) 266-9867